Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

PATRICK PARALIS,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Do the Sixth and Fourteenth Amendments require administration of a colloquy prior to allowing a defendant to waive counsel in the pretrial context, as the U.S. Court of Appeals held in *U.S. v. Welty*, 674 F.2d 185 (3rd Cir. 1982) and *U.S. v. Peppers*, 302 F.3d 120 (3rd Cir.), *cert denied,* 537 U.S. 1062 (2002), and as this Court urged in *Iowa v. Tovar*, ___ U.S. ___, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), or is a trial court absolved of providing such a colloquy merely because the pretrial proceedings do not follow the strict parameters of a state criminal procedural rule as the Pennsylvania Courts have held?

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties – Petitioner Patrick Paralis, and Respondent State of Pennsylvania.

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1. The decision below conflicts with those of the U.S. Court of Appeals for the Third Circuit and ignores this Court's decision in *Iowa v. Tovar*, ___ U.S. ___, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), by permitting a defendant to waive counsel in the pretrial context without administration of any constitutionally valid colloquy when the strict parameters of a state procedural rule are not followed but when, nonetheless, the *pro se* defendant appears at adversarial and "critical stage" pretrial proceedings.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PATRICK PARALIS respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania filed April 21, 2004, denying allowance of appeal from the judgment of the Superior Court of Pennsylvania against petitioner.

## OPINIONS BELOW

The Pennsylvania Supreme Court's denial of allowance of appeal was filed April 21, 2004. It is a non-published decision, but appears in the Appendix at App. 24. The Memorandum of the Superior Court, which denied petitioner's appeal, is also non-published, but appears in the Appendix at App. A. Timely reargument was requested of the Superior Court, which was denied on September 4, 2003. This denial appears in the Appendix at App. 25. The trial court's opinion likewise was not published but may be found in the Appendix at App. 14.

## JURISDICTION

The judgment of the Supreme Court of Pennsylvania denying allowance of appeal, is contained at App. 24. This judgment was rendered on April 21, 2004.

On July 12, 2004, under No. 04A36, Justice Souter granted an extension of time until September 18, 2004, for the filing of this petition. Since the date authorized by the extension is a Saturday, the petition is being filed pursuant to Rule 30.1. *See also*: Rules 13.1, 13.3, 13.5. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), Petitioner having asserted below and asserting herein a deprivation of rights secured under the United States Constitution.

## TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

**Amendment VI:**

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

**Amendment XIV:**

> ". . . nor shall any State deprive any person of life liberty, or property, without due process of law. . . ."

## STATEMENT OF THE CASE

Petitioner was charged with Possession of Marijuana (Small Amount), 35 P.S. 780-113(a)(31), and Possession of Paraphernalia, 35 P.S. 780-113(a)(32), at No. 2008 of 2001, Court of Common Pleas of Luzerne County, Pennsylvania. These charges arose from an incident in a parking lot of a nightclub where members of a drug task force arrested Petitioner and his girlfriend for allegedly passing a small

pipe between them in their car. The only marijuana found either on Petitioner or in his car was "minute" residue in the pipe itself, which when tested, amounted to one-tenth of one gram.

At arraignment, the Chief Public Defender of Luzerne County entered his appearance on behalf of Petitioner. Although Petitioner was ultimately deemed ineligible for his services, there is no indication of record that the Public Defender attempted or succeeded in officially withdrawing from representation of Petitioner. Instead, Petitioner was left to appear before the trial court on several occasions *pro se*, with the trial court finally directing him to observe several trials during the week before commencement of his own trial. During one of these sessions, Petitioner made a motion to sever his trial from that of his girlfriend, which was denied. After observing two trials, the trial judge then directed Petitioner to appear for a pretrial conference. This occurred on Friday, January 11, 2002, with trial set to commence on Monday, January 14, 2002. Immediately before trial on that Monday morning, Petitioner appeared with private counsel whom he had just retained. Despite his having appeared at certain critical stages of the prosecution post-arraignment without the presence of counsel, including the pretrial conference of January 11, 2002, no constitutionally valid colloquy, nor even the semblance of one, concerning the right to counsel and the ramifications of waiving same, was ever administered to Petitioner.

At the Friday pretrial conference, petitioner, on his own, requested continuance of the upcoming trial. This was denied. Petitioner's newly retained counsel renewed this motion immediately before trial, which was likewise denied. Petitioner, with his new counsel, proceeded to

trial, joined by his co-defendant, with the jury finding each guilty of the two counts of the criminal information. At Petitioner's sentencing, the trial court imposed a term of incarceration of two (2) to six (6) months, with immediate work release and automatic parole after service of the minimum term. This sentence of incarceration was imposed despite this being Petitioner's first criminal conviction. Timely appeal was filed, with the Superior Court of Pennsylvania upholding the judgment of sentence, denying reargument, and the Supreme Court of Pennsylvania denying allowance of appeal thereafter. With the grant of the above-cited extension, the present timely petition is filed.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to explain what type of colloquy the Sixth and Fourteenth Amendments, U.S. Const. Amends. VI and XIV, require before a criminal defendant may waive the right to assistance of counsel and appear *pro se* in a pretrial context other than entry of a guilty plea. In this case, the courts below allowed Petitioner to appear *pro se* before the trial court from arraignment to the very eve of trial and to engage in motion practice without providing ***any*** colloquy concerning the waiver of the right to counsel. This decision conflicts with that of the U.S. Court of Appeals for the Third Circuit, and further flouts the ancillary premise of this Court's decision last term in *Iowa v. Tovar*, __U.S.__, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004).

The fundamental right to counsel guaranteed by the Sixth Amendment and applied to the states through the

Fourteenth Amendment, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), attaches to all critical stages of the criminal process. *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). While this right to the assistance of counsel also includes the right to proceed on one's own behalf without counsel, *Faretta v. California*, 422 U.S. 806, 955 S.Ct. 2525, 45 L.Ed.2d 562 (1975), waiver of such a fundamental right as the right to counsel must be preceded by an appropriate examination to determine that the defendant "knows what he is doing and his choice is made with eyes open." *Patterson v. Illinois*, 427 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

These principles were before this Court in *Tovar*. It is important to note that *Tovar* involved a collateral attack on a previously un-counseled conviction which then implicated the recidivist portion of Iowa's driving under the influence statute. The question posed by *Tovar* concerned the nature of the colloquy required by the Sixth Amendment prior to a *pro se* defendant's entry of a guilty plea. This Court rejected the Iowa Court's interpretation that such a colloquy must inform the defendant: (1) of the risk of losing a viable defense which may be overlooked if his/her guilty plea were entered without the assistance of counsel; and (2) of the deprivation of the opportunity to obtain an independent opinion on the wisdom of pleading guilty. Instead, the *Tovar* Court held that "a less searching or formal colloquy may suffice at earlier stages of the criminal process" than at trial. "Less rigorous warnings are required pretrial because, at that stage, the full dangers and disadvantages of self representation . . . are less substantial than they are at trial." *Tovar, supra* (internal citations omitted).

While *Tovar* loosens the formality of the colloquy required by the Sixth Amendment in the pretrial context, it nonetheless reaffirms that ***some*** colloquy must be administered concerning the right to counsel before a pretrial *pro se* defendant is allowed to continue. This holding is in keeping with the recognition that the "(A)ssistance (of counsel) would be less than meaningful if it were limited to the formal trial itself." *U.S. v. Ash*, 413 U.S. 300 (1973).

The Superior Court decision at issue in this matter suggests that no such colloquy was necessary in the pretrial context of Petitioner's case, since there was no indication of record that any of the proceedings which took place pretrial "were in the nature of a pre-trial conference under (Pennsylvania Criminal Procedural Rule) Pa.R. Crim.P. 570" and thus constituted a "critical stage of criminal proceedings at which a defendant is entitled to have counsel present. . . ." App. 6. Ultimately, the Superior Court concluded that there was "absolutely no indication that (Petitioner) was prejudiced by the fact that he had no counsel between arraignment in August of 2001 and trial in January 2002." App. 7. Such logic is contrary to *Ash, supra*, which places the cloak of "critical stage" designation upon those pretrial proceedings where "the accused (is) confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," and ignores this Court's discussion in *Powell v. Alabama*, 287 U.S. 45 (1932) concerning a similar stage of criminal proceedings:

> "(D)uring perhaps the most critical period of the proceedings against these defendants, that is to say, **from the time of their arraignment until**

> **the beginning of their trial**, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

(emphasis added); *see also: Kirby v. Illinois*, 406 U.S. 682 (1972).

There is no doubt that the several "status conferences" referred to by the Superior Court constituted pretrial phases where both the "procedural system" and "expert adversary" spoken of in *Ash* were in play against Petitioner;[1] this is especially so of the "conference" which was held on the Friday afternoon prior to trial, where Petitioner appeared again without counsel and was not provided with even a semblance of the colloquy which *Tovar* and *Patterson* would require. It is of no moment that the Superior Court finds that this conference did not follow the script outlined in a state procedural rule, Pa.R.Crim.P. 570. Instead, what is important is the nature of the proceeding, which included a pretrial *pro se* defendant, who appeared before the trial court literally on the eve of trial, was confronted by his "expert adversary", and moved the court without counsel present to invoke any number of procedural protections or ply his advocacy skills on behalf of Petitioner. If Petitioner had found himself in that

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[1] As the Superior Court itself notes, during at least one of these "conferences", Petitioner moved to sever his trial from that of his co-defendant. App. 4. Certainly, this motion was litigated in the context of a "procedural system" with "expert adversary" present on the opposite side. It is the utmost strain of constitutional principle to suggest that a counsel-waiver colloquy was not required prior to Petitioner's engagement in pretrial motion practice *pro se*.

situation "know(ing) what he (was) doing and his choice (were) made with eyes open," *Patterson, supra,* the constitutional guarantees at issue here would not be infringed. However, such was not the case. Not having the benefit of even a modest colloquy as envisioned by *Tovar* and *Patterson*, Petitioner's eyes remained unopen, and his Sixth and Fourteenth Amendment rights were subverted.

The Superior Court dismisses Petitioner's claim based largely on its acceptance of the trial court's characterization of Petitioner's conduct as constituting "a paradigmatic example of an individual seeking to 'play' the system." App. 6 at fn.3. This assessment is unfortunate, not only because there is nothing of record to support it, but more importantly because it suggests that denial of the *Tovar/ Patterson* colloquy pretrial may be excused if a defendant is suspected of being improperly manipulative. As noted by the U.S. Court of Appeals for the Third Circuit, such a consideration is constitutionally improper. In *U.S. v. Welty*, 674 F.2d 185 (3rd Cir. 1982), the Third Circuit held that "a judge conducting a trial must – despite his suspicions as to the defendant's motives – at all times make certain that he has protected the defendant's constitutional rights." This protection, the Court said, includes the requirement that a pretrial defendant must be examined as to his understanding of his right to counsel before being allowed to proceed on his own. *Welty, supra*.

In holding otherwise, the decision of the Pennsylvania state courts represent a split on this essential area of constitutional law which can only and properly be resolved by this Court through grant of the present petition. The Third Circuit would require a pretrial colloquy "even when the trial judge strongly suspects that the defendant's

requests are disingenuous and designed solely to manipulate the judicial process and delay trial." *Welty, supra.*[2] On the other hand, the Superior Court would use its unsubstantiated suspicion of such "manipulation" as a basis for deferring its obligation to conduct the colloquy the Third Circuit envisions in the pretrial setting.[3] While *Tovar* established a refinement of the counsel-waiver colloquy in a setting other than trial, its limited context, i.e., guilty plea procedures, leaves open the question of what sort of colloquy the Sixth and Fourteenth Amendments require in other pretrial matters. With the decisions of the Pennsylvania courts in this case, not only is a split created with the Third Circuit, an outright flout of this Court's counsel waiver colloquy requirements is perpetrated. Clarification of these requirements, and settlement of that split are necessary, and may be accomplished through grant of this petition.

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[2] Adding to the split between the Pennsylvania courts and the Third Circuit is the relatively recent decision of the Circuit affirming *Welty* and finding its colloquy requirements constitutionally mandated. *See*: *U.S. v. Peppers*, 302 F.3d 120 (3rd Cir.), *cert. denied*, 537 U.S. 1062 (2002).

[3] The Superior Court suggests that Petitioner's retention of counsel the night before trial acts as a purge of any error in the failure to conduct a colloquy. The fact that counsel was retained does nothing to restore the lost opportunities available to a counseled defendant in the pretrial setting, which in this case, includes the motion practice Petitioner engaged in *pro se*. The presence of counsel moments before trial further is no cure for the dangers Petitioner faced as he maneuvered the pretrial waters on his own behalf. *See, e.g., Powell, supra*, and *Kirby, supra.*

## CONCLUSION

For the foregoing reasons, Petitioner PATRICK PARALIS prays that this Court grant his petition for writ of certiorari, vacate the judgment below and remand this case to the Supreme Court of Pennsylvania with instructions to remand to the lower court for a new trial.

Respectfully submitted,

JOSEPH M. COSGROVE
*Counsel of Record*
*Attorney for Petitioner*

J. A10023/03

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P.65.37**

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | : | |
| v. | : | |
| PATRICK PARALIS, | : | |
| Appellant | : | No. 498 MDA 2002 |

Appeal from the JUDGMENT OF SENTENCE
February 8, 2002
In the Court of Common Pleas of LUZERNE County
CRIMINAL, No. 2001-CR-0002008

BEFORE: STEVENS, BOWES, and CAVANAUGH, JJ.

MEMORANDUM: FILED: June 20, 2003

Patrick Paralis appeals from the judgment of sentence to serve a term of from two to twelve months imprisonment imposed after he was found guilty by a jury of possessing a small amount of marijuana and paraphernalia (a marijuana pipe and an empty baggie). We affirm.

The facts, as gleaned from the record, show that at approximately 12:15 a.m. on April 13, 2001, police officers spied appellant, a 51 year-old house-painter, and his girlfriend, Agnes Marie Marth, a 51 year-old secretary, sitting in a parked car in a crowded parking lot outside a drinking establishment/concert hall in Luzerne County, smoking marijuana from a pipe.[1] Two officers initially saw

[1] The officers were members of a drug-task force. Approximately twenty officers were assigned to the area that night where at least two

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the pair and approached their vehicle. The vehicle's doors were locked, the windows were closed and the motor was off. Appellant, who was in the driver's seat, was ordered to open up and get out. He did not do so. Other task force members arrived and the commands to open up and get out were repeated. Appellant did not do so. Appellant reached underneath his seat and the officers, fearful for their own safety, drew their weapons. At that point, appellant and Ms. Marth got out of the car. The pipe containing a small amount of a charred brown substance which was later confirmed to be marijuana was confiscated along with an empty plastic baggie found underneath the seat. Appellant and Ms. Marth were arrested and released at the scene.

At trial, appellant testified that he found the pipe and baggie inside a pack of Marlboro on the floor under the public telephone on his way to the men's room while inside the concert hall. He thought the pipe was empty and that it might be of some monetary value, so he stuck the pipe and baggie in his pocket, intending to ask his sister-in-law, who operates a flea-market booth, to try to sell the pipe for him. Appellant testified that when he and Ms. Marth went out to the car to drink some vodka and orange juice they had brought along from home to defray the cost of drinking at the bar, he showed her the pipe to see what she thought it might be worth. As he was showing her the pipe, the police arrived. He testified that he did not immediately open the door because he thought the officers were

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rock bands were performing concerts inside the hall. Approximately thirty arrests were made over the course of the evening. The task force members were in plain clothes but some wore identifying caps and all wore badges on chains around their necks.

"kids from the parking lot . . . harassing us." Appellant denied smoking from the pipe or knowing that there was a miniscule amount of marijuana in it. Ms. Marth, who was tried as a co-defendant, corroborated appellant's version of events. Both were convicted of possession of a small amount of marijuana and paraphernalia.[2]

Appellant raises five issues:

I. THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PROCEED *PRO SE* DURING CRITICAL STAGES OF THIS PROSECU TION WITHOUT FIRST REQUIRING COURT-APPOINTED COUNSEL OF RECORD TO WITH DRAW, AND WITHOUT CONDUCTING A CONSTITUTIONALLY VALID COLLOQUY CONCERNING WAIVER OF COUNSEL.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S *PRO SE* REQUEST FOR CONTINUANCE AND IN FAILING TO GRANT NEW COUNSEL'S REQUEST FOR CONTINUANCE IMMEDIATELY BEFORE TRIAL.

III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT COUNSEL FAILED TO PRESENT ARGUMENT RELATING TO THE CONSTITUTIONAL IMPROPRIETY OF CERTAIN EVIDENCE, ESPECIALLY INTRODUCTION OF A STATEMENT OF HIS NON-TESTIFYING CO-DEFENDANT IN VIOLATION OF *BRUTON V. US.*

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[2] There are no issues before us concerning Ms. Marth's judgment of sentence.

IV. ALLOWANCE OF APPEAL SHOULD BE GRANTED CONCERNING THE DISCRETIONARY ASPECTS OF SENTENCE IN THAT: THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A MANIFESTLY EXCESSIVE SENTENCE UNDER THE CIRCUMSTANCES AND FACTS OF THIS CASE, AND IMPOSED SENTENCE IN THE AGGRAVATED RANGE OF THE SENTENCING GUIDELINES BASED UPON IMPROPER CONSIDERATIONS.

V. UNDER THE FACTS OF THIS CASE, THE RULES OF STATUTORY CONSTRUCTION PROHIBIT CONVICTION ON THE GENERAL CHARGE OF POSSESSION OF PARAPHERNALIA SINCE APPELLANT WAS CONVICTED OF THE SPECIFIC CHARGE OF A SMALL AMOUNT OF MARIJUANA.

We will treat appellant's first two claims together. We would first note that appellant was represented by the office of the Public Defender at his preliminary hearing and arraignment during the summer of 2001. However, it appears that appellant's financial status was such that he was subsequently deemed ineligible for representation. There were several status listings of the case prior to trial. At each listing, appellant appeared *pro se* and was encouraged by the court to retain counsel.

At the status conference on December 17, 2001, before the Honorable Michael Conahan, appellant was advised that his case would be listed for trial during the week of January 8, 2002. He was advised to retain counsel. On the call of the list on January 8, 2002, appellant again appeared *pro se*. His *pro se* motion for severance was denied. He was advised that the case would be listed for trial during the week of January 14, 2002. Appellant maintained

that he would represent himself at trial. The court arranged to allow him to observe the conduct of two criminal trials in Judge Olszewski's courtroom that week.

On Friday, January 11, 2002, after observing the trials, another status conference was held. Appellant was again advised that his case was listed for trial the following week and that he should retain counsel. Appellant reiterated his desire to proceed *pro se* and his motion for a trial continuance that date was denied. He retained counsel on Sunday, January 13th and the next day appeared with counsel for trial. A request for continuance was denied as follows:

> THE COURT: He knew that he needed a lawyer. We've had seven months go by, and he's chosen deliberately not to obtain counsel. At each of the calls of the list in December, Judge Conahan advised him to get a lawyer. He indicated that he didn't want a lawyer. He sat, at Judge Conahan's instruction, in my two jury trials last week, as a matter of fact, to familiarize himself. He told me personally last week that he was representing himself and that he was not getting a lawyer. I told him, again, just like other judges have told him that he'd be better off with one but that I was not continuing the case, and I repeated that. He asked for a continuance last Friday. I denied it. That wasn't good enough when I told him that. He then decided to go to the Court Administrator's Office and to bother a deputy court administrator about a continuance. She said she can't do that, it's up to the trial judge. That wasn't good enough. Now he goes back to Judge Conahan. He says, Judge Conahan, I want another continuance; Olszewski won't give me one. Judge Conahan refused.

> You [counsel] came in today. That's fine. If you'd like to represent him, you obviously may; but there will not be a continuance. This whole system is not going to be delayed because this man has ignored any responsibility to himself for six months. I'm not going to continue it.[3]

Appellant now argues that the court erred in failing to conduct a colloquy regarding appellant's waiver of pre-trial right to counsel. Although a pre-trial conference is a critical stage of criminal proceedings at which a defendant is entitled to have counsel present, ***Commonwealth v. Tarver,*** 384 A.2d 1292 (Pa.Super. 1978), and a person's waiver of the right to counsel must be demonstrably knowing and voluntary, ***Commonwealth v. Payson,*** 723 A.2d 695 (Pa.Super. 1999), we rather easily conclude that appellant's claim lacks merit.

First, appellant has made no showing whatsoever that any of the pre-trial status listings. which he attended *pro se* were in the nature of a pre-trial conference under Pa.R.Crim.P. 570. In fact, the trial court stated that the conference it conducted with appellant on January 11th was *not* a pre-trial conference at which the parties considered procedures, issues, and evidence which might control the subsequent proceedings. ***See*** Rule 570.[4]

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[3] We agree with the court's conclusion that appellant's repeated requests for a trial continuance amounted to improper gamesmanship. In its opinion *sur* appeal the court expressed that "an objective observer reviewing the docket and transcript in this case may conclude that it presents a paradigmatic example of an individual seeking to 'play' the system."

[4] Appellant does not expressly claim that either of the earlier status listings before Judge Conahan were in the nature of a pre-trial conference. To the extent appellant alleges that these conferences

(Continued on following page)

Second, and perhaps most significant, appellant did not appear at trial *pro se* but, in fact, was represented by counsel whom appellant had apparently retained the night before. We have carefully reviewed the record in light of appellant's claim and see absolutely no indication that appellant was prejudiced by the fact that he had no counsel between arraignment in August of 2001 and trial in January of 2002. As the court aptly noted, this was not a complex case but "presented a simple and straightforward determination for the jury." The Commonwealth's witnesses testified that they saw appellant and the co-defendant smoking marijuana in his car. Appellant and his co-defendant testified that they did not smoke marijuana but that they merely passed the pipe around to inspect it, not knowing it had marijuana inside the bowl.

For similar reasons we find that the court did not err in denying appellant's motions for continuance. Appellate review of a trial court's decisions on continuance motions is for an abuse of discretion. ***Commonwealth v. Peay,*** 806 A.2d 22, 31 (Pa.Super. 2002). We find none here and conclude that no continuance was necessary in order to advance the interests of justice. ***See*** Pa.R.Crim.P. 301. Appellant's reliance on ***Commonwealth v. McAleer,*** 748 A.2d 670 (Pa. 2000), to support his position is misplaced as ***McAleer*** is factually dissimilar. In that case, substitute counsel, unfamiliar with the facts of the case, was denied a continuance request and was immediately required to go

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represented a critical stage requiring counsel or a voluntary waiver, we disagree. The result of the first status listing before Judge Conahan was simply to set the case for stand-by readiness during the week of January 8th. The second status listing before Judge Conahan, on January 8th, resulted in re-listing the case for stand-by readiness the following week.

to trial despite his averment that he was unprepared to do so. ***Id.*** The supreme court concluded that, under the circumstances, the defendant's right to counsel of his choice outweighed the state's interest in the efficient administration of justice and found that the trial court abused its discretion in denying the continuance request. Here, however, trial counsel was, in fact, appellant's counsel of choice and no showing was made that counsel was unfamiliar with the facts of the case or was unprepared to go to trial. Rather, after reviewing the facts, counsel requested a continuance, not because he was unprepared to go to trial, but because he wished to prepare and present an unspecified motion to suppress. We see no abuse of discretion under these circumstances.

Appellant next claims that counsel was ineffective for failing "to present argument [to the jury] relating to the constitutional impropriety" of Ms. Marth's "statement" that the pipe belonged to appellant.[5] At trial, an arresting officer testified that when she questioned Ms. Marth regarding the pipe, Ms. Marth said that it belonged to appellant. Ms. Marth denied that she made the statement. Both the officer and Ms. Marth were cross-examined.

The primary basis for appellant's claim is the rule announced by the United States Supreme Court in ***Bruton v. United States***, 391 U.S. 123 (1968), which held

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[5] Generally, claims of ineffectiveness of counsel should not be raised on direct appeal, but should be raised in a PCRA petition. ***Commonwealth v. Grant,*** 813 A.2d 726 (Pa. 2002). However, where the length of sentence imposed is of a short duration such that post-conviction review is unlikely to occur, a claim of ineffectiveness may be raised and reviewed on direct appeal. ***Commonwealth v. Salisbury,*** 2003 PA Super 167, ¶ 7 (April 29, 2003).

that the prosecution's introduction into evidence of a non-testifying co-defendant's confession violated the other defendant's constitutional rights to a fair trial and to confront and cross-examine the witnesses against him. ***Bruton*** and it's progeny are simply inapplicable here and appellant is entitled to no relief. First, Ms. Marth testified at trial and was cross-examined. Second, she testified that she did *not* tell the arresting officer that the pipe belonged to appellant. Appellant's claim that counsel was ineffective for failing to seek preclusion of the "statement" on the basis of the rule announced in ***Bruton*** is dismissed as raising no issue of arguable merit.

We also reject appellant's claim that the rules of statutory construction prohibit his conviction of both possession of a small amount of marijuana and possession of paraphernalia.[6] The gravamen of appellant's claim is the rather novel argument that a small amount of marijuana cannot be possessed absent some sort of paraphernalia to contain it. Appellant posits that because the statutory maximum penalty for possession of a small amount of marijuana is 30 days imprisonment, while the maximum penalty available for possession of paraphernalia is one year imprisonment, that the legislature did not intend for a defendant to be potentially exposed to the imposition of a sentence greater than 30 days when the small amount of marijuana possessed is entirely contained in a marijuana pipe. Thus, appellant argues, because the rules of statutory construction favor specific provisions over general provisions, only the provisions of the more

[6] The amount of marijuana possessed by appellant was 0.10 grams and consisted entirely of the charred remainder and residue contained in the pipe.

specific statute, i.e., the marijuana statue, apply. We disagree. It is clear that a small amount of marijuana and drug paraphernalia are two entirely different articles of contraband. Certainly one article can be possessed without the other and appellant's novel claim, unsupported by any relevant authority, is dismissed as meritless.

Appellant also challenges the discretionary aspects of sentencing. He has complied with appellate procedure by including in his brief a separate statement of reasons relied upon for allowance of appeal. Pa.R.A.P. 2119(f); ***Commonwealth v. Tuladziecki,*** 522 A.2d 17 (Pa. 1987). Appellant claims that the sentence imposed was excessive and that the court considered improper factors in fashioning sentence. We will grant an appeal from the discretionary aspects only when a substantial question has been raised that the sentence imposed is not appropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Urrutia,*** 653 A.2d 706, 710 (Pa.Super. 1995).

The Commonwealth responds that appellant has failed to raise a substantial question because the sentence imposed was within the statutory limits. We disagree. Our supreme court has recently held that this court cannot, as a matter of law, reject excessiveness claims on the basis that the sentence is within the statutory limits. ***Commonwealth v. Mouzon,*** 812 A.2d 617, 627-28 (2002). "Rather, when an excessiveness claim is raised in cases where the sentence falls within the statutory limits, this Court is to review each claim on a case-by-case basis to determine whether a substantial question has been presented." ***Commonwealth v. Titus,*** 816 A.2d 251, 255 (Pa.Super. 2003). "While we need not accept bald allegations of excessiveness, where the appellant has provided a plausible argument that a sentence is contrary to the

Sentencing Code or the fundamental norms underlying the sentencing process, a substantial question exists, requiring a grant of allowance of the discretionary aspects of the sentence." ***Id.*** (citing ***Mouzon, supra,*** 812 A.2d at 627).

We conclude that appellant has raised a substantial question and we grant his request for permission to appeal from the discretionary aspects. Nonetheless, after careful review, we conclude that appellant's challenge to the discretionary aspects of sentencing lacks merit.

> The standard of review in sentencing matters is well settled: imposition of sentence is vested in the discretion of the sentencing court and will not be disturbed by an appellate court absent a manifest abuse of that discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill will. An appellate court shall vacate a sentence and remand for resentencing if the sentence is outside the guidelines and is "unreasonable." If the sentence is "not unreasonable," the appellate court must affirm.

***Commonwealth v. Griffin,*** 804 A.2d 1, 8 (Pa.Super. 2002) (citations omitted). "In considering whether a sentence was manifestly excessive the appellate court must give great weight to the sentencing judge's discretion, as he or she is in the best position to measure various factors such as the nature of the crime, the defendant's character and the defendant's display of remorse, defiance or indifference? ***Commonwealth v. Ellis,*** 700 A.2d 948, 958 (Pa.Super. 1997). Moreover, when a court refers to the existence of a pre-sentence report the presumption is

created that the court sentenced within its discretion and in consideration of the sentencing factors. ***Commonwealth v. Devers,*** 546 A.2d 12 (Pa. 1988); ***Commonwealth v. Griffin, supra.*** We have carefully reviewed the record and are persuaded that the court properly considered all relevant factors and circumstances in fashioning sentence and that the sentence imposed was not manifestly excessive.

The sentencing court had the benefit of a pre-sentence investigation (PSI) report. Although the PSI- revealed a prior record score of zero, it contained an allegation that appellant had previously refused to pull over when an officer suspected him of driving with a suspended license. The circumstances of the instant case show that appellant similarly refused to get out of his car when directed to do so. The court explained that it was imposing a sentence of incarceration due to the "conduct you have been involved in over the years; and that is a lack of cooperation, a lack of respect with law enforcement, and a lack of ability to follow directives given to you by law enforcement officers. Your conduct has never changed. It's been the same. That's the way I see the PSI." The court continued:

> . . . The court is going to deviate into the aggravated range for the following reasons. Number one, the Defendant's total lack of cooperation with law enforcement. Number two, his continued lack of remorse for the incident. Number three, in order to deter others from similar conduct.
>
> The Court sentences the Defendant to a period of incarceration of two months to twelve months. He'll be immediately paroled upon conclusion of the two-month minimum. He'll thereafter

be under the direction of the Luzerne County Adult Probation and Parole department. He'll undergo a mental health evaluation by Community Counseling Services and comply with any and all recommendations of that agency. He'll undergo random urinalysis by the Probation and Parole Department. He'll perform sixty hours of community service, specifically for the Northeastern Pennsylvania Council of the Boy Scouts of America. I suspect that come this spring there will be plenty of painting projects at Camp Achela that he'll be able to give substantial help to. And he'll pay the cost of prosecution on a schedule to be determined by Probation and Parole.

I'm also specifically right now ordering immediate work release for the two months of his incarceration. He can go and should go to work each day.

We find no abuse of discretion and conclude that the sentence imposed was not unreasonable.

The judgment of sentence is affirmed.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: JUN 20 2003

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF |
| VS. | : | LUZERNE COUNTY |
| PATRICK PARALIS | : | CRIMINAL DIVISION |
| | : | NO. 2008 OF 2001 |

**ORDER**

AND NOW, this 15th day of July, 2002, at 5:40 o'clock A.m., it is hereby DIRECTED that the attached Opinion is entered pursuant to Pa. R.C.P. 1925(c) in response to Defendant's Statement of Matters Complained of on Appeal.

BY THE COURT:

/s/ Peter Paul Olszewski, Jr. J.
OLSZEWSKI, J.

Copies:

District Attorney David W. Lupas
Joseph M. Cosgrove, Esquire

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF |
| VS. | : | LUZERNE COUNTY |
| PATRICK PARALIS | : | CRIMINAL DIVISION |
| | : | NO. 2008 OF 2001 |

**OPINION**

BY: HONORABLE PETER PAUL OLSZEWSKI, JR.

## I. PROCEDURAL HISTORY

A preliminary hearing in the above-captioned matter was conducted on June 7, 2001 at which time Defendant was represented by Vito DeLuca, Esq. Defendant was arraigned on August 17, 2001 at which time he pled not guilty and was represented by Basil G. Russin, Esq.

In Information 2008 of 2001 Defendant was charged with possession of a controlled substance (35 P.S. § 780-113(31)) and possession of drug paraphernalia (35 P.S. § 780-113(32)).

The Defendant was convicted of both Counts subsequent to a jury trial which occurred on January 14-15, 2002. During the course of the jury trial, Defendant was represented by Nanda Palissery, Esq.

This Court imposed sentence on February 8, 2002. Post-Sentence Motions were filed by Joseph M. Cosgrove, Esq. on February 19, 2002 and denied and dismissed on February 20, 2002. A Notice of Appeal was filed on March 18, 2002 and on March 19, 2002 an Order was issued pursuant to Pa. R.A.P. 1925(b) directing Defendant to file a Statement of Matters Complained of on Appeal. A document purporting to comply with that Order was received on April 2, 2002 and Commonwealth's response on April 9, 2002.

## II. LAW AND DISCUSSION

Defendant's Matters Complained of on Appeal consist of seven (7) separate allegations of error. They are as follows: (1) The Court erred in failing to adequately advise and/or provide a constitutionally valid colloquy concerning Defendant's waiver of counsel during critical pre-trial

proceedings in this matter, including the pre-trial conference; (2) The Court erred in denying Defendant's pro-se request for a continuance and in failing to grant the newly retained defense counsel's request for continuance immediately prior to trial; (3) Trial counsel provided ineffective assistance of counsel in failing to argue before the jury that certain evidence against Defendant was illegally obtained and should have been suppressed, in violation of the United States and Pennsylvania Constitutions; (4) Defendant's right to discovery was denied by the undue delay of the Commonwealth in providing same; (5) The facts of this case and the rules of statutory construction prohibit conviction on the charge of drug paraphernalia along with possession of a small amount of marijuana; (6) That the sentence imposed by Court is without adequate statement of support, based on improper considerations and unduly harsh given the facts, circumstances, amounts involved and nature of the alleged offense; (7) In this allegation of error, Defendant purports to incorporate allegations raised in the Post-Sentence Motion.

We simply note that there is substantial conceptual overlap between the Post-Sentence Motion and Statement of Matters Complained of on Appeal. The Post-Sentence Motion, however, specifically identifies the pre-trial conference held before the Honorable Peter Paul Olszewski, Jr., on Friday, January 11, 2002 as a critical stage in the trial in which Defendant participated pro-se in the absence of the Court conducting, "a constitutionally adequate colloquy concerning his waiver of counsel".

Prior to a consideration of the issues raised by Defendant's present Counsel, his fourth, we are constrained to observe that the documents filed by respective Counsel in response to this Court's Order of March 19, 2002 are

woefully inadequate and provide little, if any, assistance to the Court. Neither the Statement of Matters Complained of on Appeal nor the Commonwealth's response contain a reference to a single case, appellate or otherwise. Additionally, other than the aforementioned date of the pretrial, Defendant's allegations of error are in large measure vague, nebulous and fail to direct the Court to specific record evidence in support of the arguments advanced.

With regard to Defendant's claim that the Court failed to adequately advise and/or provide a constitutionally valid waiver of counsel colloquy, it is imperative to note the transcript reflects that prior to the matter being assigned to the undersigned for trial, President Judge Michael T. Conahan made numerous efforts to advise this Defendant of the importance and necessity of securing Counsel. (N.T. page 5, 7). The docket further reflects that President Judge Conahan continued this matter from December 17, 2001 until January 8, 2002 in the context of Defendant's repeated insistence that he wished to represent himself. On January 8, 2002 President Judge Conahan afforded Defendant an opportunity to observe criminal cases before the undersigned and further directed his trial would be placed on stand-by for the week of January 14, 2002. As previously indicated, the documents contained in the Clerk of Court's file clearly reflect that Defendant was represented by Counsel at the Preliminary Hearing in this matter, which, incidentally, was not waived and further that Defendant was represented by Mr. Russin at his formal arraignment before the Court of Common Pleas. President Judge Conahan went to considerable lengths in an effort not only to persuade and advise Defendant to obtain new counsel, but after Defendant's absolute insistence that he would represent himself, to

afford him an opportunity to observe other criminal trials. Defendant continued to insist he would represent himself at a status conference conducted before this Court on Friday, January 11, 2002. After having been represented by Counsel both at the preliminary hearing and at arraignment and after choosing to ignore the repeated suggestions of the President Judge and the trial Court, in this regard, literally, on the eve of trial, Defendant secured Counsel to represent him who in turn requested a continuance for additional time to review the case and because of unarticulated suppression issues. (N.T. 5-12).

It is significant to note that, despite present Counsel's protestations to the contrary, the pre-trial proceeding conducted on January 11, 2002 was not a pre-trial conference within the contemplation of Pa R.Crim.P. 570. We are aware of Superior Court's determination in *Commonwealth v. Tarver*, ___ Pa. Super.___, 384 A.2d. 1292 (1978) that a pre-trial conference is a critical stage of the proceedings in which potential substantial prejudice to the defendant's rights inheres and that the presence of counsel is required to help avoid that prejudice. If, therefore, a defendant insists on representing himself, a waiver colloquy must be conducted prior to his participation in such a proceeding. *Tarver* also notes, however, that a pre-trial conference is not a mandatory part of a criminal prosecution in the Commonwealth of Pennsylvania and further that should one be conducted without the presence of counsel, a Court may later determine that, depending on the circumstances, it was harmless error beyond a reasonable doubt.

Since the conference conducted on the Friday before trial was not within the contemplation of Rule 570, it was unnecessary for this Court to engage in the colloquy

required by Pa. R.Crim.P. 121. Further, the purpose of the conference was to merely determine the status of the case and to again encourage this Defendant to secure Counsel. We can perceive of no prejudice inuring to Mr. Paralis as a result of the conference and indeed none is suggested.

Defendant's contention that the Court abused its discretion in denying trial Counsel's request for a continuance at the inception of the trial is similarly without merit. Pa. R.Crim.P.106 governs continuances in criminal cases and specifically provides, "A motion for a continuance on behalf of the defendant shall be made not later than 48 hours before the time set for the trial. A later motion shall be entertained only when the opportunity therefore did not previously exist, or the defendant was not aware of the grounds for the motion, or the interests of justice require it". As the record amply demonstrates, this Defendant was not only represented by Counsel at the preliminary stages in the criminal process, but subsequently insisted that he wished to represent himself at trial. He was afforded every opportunity to obtain counsel and simply ignored the Court's suggestions and admonitions. When this Defendant's request is balanced against the administration of the Court calendar and the public need for the efficient and effective administration of justice can perceive of no abuse of discretion in denying the continuance. Indeed, to permit another delay would allow Mr. Paralis and others similarly situated, to eventually create chaos in the criminal justice system. See

generally, *Commonwealth v. Andrews*, ___ Pa. Super. ___, 422 A.2d 855 (1980)[1]

We now turn to Counsel's contention that trial Counsel was ineffective in failing to argue to the jury that certain evidence against Defendant was illegally obtained and should had [sic] been suppressed. Not only does Counsel fail to identify the specific evidence and the legal basis for its suppression, we fail to understand how Counsel could make that argument to a jury.

The Rules of Criminal Procedure clearly provide for the presentation and consideration of requests for suppression of evidence. Pa. R.Crim.P. 578 entitled "Omnibus pre-trial motion for relief", indicates, "unless otherwise required in the interest of justice, all pre-trial requests for relief shall be included in one omnibus pre-trial motion". The timeframe for the filing of an omnibus motion is set forth in Pa. R.Crim.P. 579 which provides, in part, that the motion shall be filed and served within thirty (30) days after arraignment, unless opportunity therefore did not exist, or, the defendant or defense attorney, or the attorney for the commonwealth, was not aware of the grounds for the motion. Finally, Pa. R.Crim.P. 581 entitled "Suppression of evidence" indicates at subsection (B), "unless the opportunity did not previously exist, or the interest of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pre-trial rule set forth in Rule 578. If timely motion is not made hereunder, the issue of

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[1] Indeed, an objective observer reviewing the docket and transcript in this case may conclude that it presents a paradigmatic example of an individual seeking to "play" the criminal justice system.

suppression of such evidence shall be deemed to be waived". The official comment to the Rule reiterates, "It should be noted that failure to file the application within the appropriate time limit constitutes a waiver of the right to suppress".

Our appellate courts have had occasion to examine the substantive provisions of Rule 581 and its predecessor, Rule 323. In *Commonwealth v. Hubbard*, ___ Pa. ___, 372 A.2d 687 (1977), the Supreme Court rejected defendant's contention that he fell within the Rule's exceptions. It is important to note that in considering the "interests of justice exception", the Opinion instructs that a trial judge's discretion should be exercised only where the merits of counsel's oral motion were so apparent that justice required that it be heard. See also, *Commonwealth v. Barnyak*, ___ Pa. Super. ___, 639 A.2d 40 (1994). Neither trial Counsel nor present Counsel suggests a basis for the suppression of evidence in this matter. It is unequivocally not this Court's obligation, responsibility or prerogative to posit theories regarding suppression of evidence, independently conduct legal analysis, and conclude whether or not the theories possess merit. Indeed this stands the adversary process and our jurisprudence on its head.[2]

Parenthetically, it should be immediately obvious to anyone reviewing the 302 page trial transcript that this case presented a simple and straight forward determination for the jury. The Commonwealth witnesses and the

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[2] Based upon our review of the transcript, we can discern no apparent or obvious suppression issue. It is not our function to guess, speculate or make determinations in a legal vacuum.

Defendant presented diametrically opposed versions of the incident and it was the jury's prerogative to decide which one to accept. In this vein, we note that neither the Post-Verdict Motions nor the Statement of Matters Complained of on appeal attempt to suggest that the evidence was insufficient – indeed once the issue of credibility had been resolved the evidence of this Defendant's guilt was overwhelming.

Counsel's contention that Defendant's right to discovery was denied because of "undue delay" by the Commonwealth in providing same is nearly incomprehensible. Again, in this instance, Defendant fails to specify the nature of the discovery the Commonwealth failed to supply nor its significance and/or impact in the trial of this matter. Further, Defendant's contention is belied by the representations of the Assistant District Attorney. (N.T. page 224). It should also be noted that trial Counsel never suggested that the alleged untimeliness of discovery or its content in anyway prejudiced Defendant.

Defense Counsel's argument that the facts of this case and unspecified rules of statutory construction prohibit conviction on the charge of possession of drug paraphernalia along with possession of a small [sic] of marijuana, is similarly difficult to comprehend. After a review, albeit cursory, of the cases set forth in the applicable annotation, we can discern no legal impediment to Defendant's conviction for possession [sic] paraphernalia and possession of a small amount. The elements of the two crimes are clearly dissimilar and the fact that the controlled substance is contained within the paraphernalia does not, in our judgment, excuse its possession or render the charged [sic] redundant or superfluous thus prohibiting imposition of sentence on same.

Finally, the reasons for this Court's imposition of sentence in the aggravated guideline range on the drug paraphernalia conviction were fully and adequately set forth in the sentencing transcript of February 8, 2002. Specifically at pages 9 and 13, we identify three (3) reasons for this deviation and the transcript further reveals the Court's awareness and consideration of the Pre-Sentence Investigation conducted by Luzerne County Adult Probation and Parole Department.

In conclusion, we are compelled to note until our jurisprudence demands that trial courts adopt a paternalistic approach towards criminal defendants, requires that the schedules of the Court, prosecutors and law enforcement personnel are literally insignificant, and allows violation of the Rules of Criminal Procedure with impunity, no relief is appropriate in the instant matter. The Rules of Criminal Procedure apply to all defendants, represented and unrepresented. This, of course, should be a self evident proposition. This record demonstrates that this Defendant was, in fact, initially represented by Counsel, subsequently chose and insisted that he represent himself and then on the morning of his scheduled trial appears with Counsel. We find nothing in this record, or the circumstances of this case, to conclude that error was committed and accordingly enter the following.

**END OF OPINION**

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA,<br>Respondent<br>v.<br>PATRICK PARALIS,<br>Petitioner | : | No. 742 MAL 2003<br>Petition for Allowance of Appeal from the Order of the Superior Court |

**ORDER**

**PER CURIAM**

**AND NOW**, this 21st day of April, 2004, the Petition for Allowance of Appeal is **DENIED**.

J. A10023-03

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| PATRICK PARALIS, | : | |
| APPELLANT | : | No. 498 MDA 2002 |

**ORDER OF COURT**

The Court hereby DENIES the application filed July 7, 2003, requesting reargument or reconsideration of the decision dated June 20, 2003.

PER CURIAM

DATE: September 4, 2003